IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 303

RUSSELL G. COLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, The Supreme Court of the United States:

Comes now the above-named petitioner and respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is here sought to be reviewed, has not yet been officially reported. Ap-

pended hereto are copies of the opinion and of the judgment order in case No. 15913, in said court (Appendix A, *infra* and Appendix B, *infra*).

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit were entered on June 18, 1958. A Petition for Rehearing was duly and timely filed by petitioner on July 7, 1958, and was denied by the court below on July 17, 1958. On August 15, 1958, Mr. Justice Black extended the time for filing the petition for a writ of certiorari to and including August 26, 1958.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254 (1). Jurisdiction of the trial court derived from Title 18 U.S.C. Section 3231. The proceedings were initiated by the filing of an Information by the United States Attorney for the Western District of Missouri charging violation of Title 18 U.S.C. Section 1262.

QUESTIONS PRESENTED

1. Where the prosecuting attorney is allowed to read into evidence petitioner's Motion to Suppress Evidence which contains incriminating admission, and which has been withdrawn with leave of court, has petitioner been deprived of the full protection of the Fourth and Fifth Amendments to the Constitution of the United States so as to constitute reversible error?

2. Whether Oklahoma, which by statute permits, for revenue purposes, the sale, in lawful commercial channels outside the state, of intoxicating liquor seized within its boundaries, is a state "in which all sales,

except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor * * * are prohibited."

STATUTES INVOLVED

Title 18 United States Code, Section 1262 provides as follows:

> "Whoever imports, brings, or transports any intoxicating liquor into any State, Territory, District or Possession in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor containing more than 4 per centum of alcohol by volume or 3.2 per centum of alcohol by weight are prohibited, otherwise than in the course of continuous interstate transportation through such State, Territory, District, or Possession or attempts so to do, or assists in so doing.
>
> Shall (1) If such liquor is not accompanied by such permits, or licenses therefor as may be required by the laws of such State, Territory, District, or Possession or (2) if all importation, bringing or transportation of intoxicating liquor into such State, Territory, District, or Possession is prohibited by the laws thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "In the enforcement of this section, the definition of intoxicating liquor contained in the laws of the respective States, Territories, Districts, or Possessions shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited therein";

Section 50.1 of Title 27, Oklahoma Statutes of 1951, provides as follows:

> "It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause

to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State, containing more than four per cent (4%) of alcohol by volume, without a permit first secured therefor as hereinafter provided."

Sections 101-108 of Title 37, Oklahoma Statutes of 1951, are set forth in full in Appendix E, *infra*.

STATEMENT OF THE CASE

By Information filed January 25, 1957, in the United States District Court for the Western District of Missouri, Southwestern Division, in case No. 2287, petitioner herein, Russell G. Cofer, was charged in Count I thereof, with attempting "to transport intoxicating liquor into the State of Oklahoma, in which state all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor * * * are prohibited by the laws" of said State, other than in the course of continuous interstate transportation through said State, in violation of Section 1262, Title 18, United States Code, on or about September 24, 1955 (R. 1, 2).[1] George Preston Sappington was charged conjointly in a separate count—Count II.

On November 7, 1957, petitioner's Motion to Suppress Evidence was filed, subscribed only by his attorney of record, in the following language:

"Comes now the defendant, Russell G. Cofer, and represents and shows to the Court that on

[1] References to the Transcript of Record used in the court below and accompanying this petition are designated by "R" followed by the page number. References to the Appendix to this petition are designated by referring to the pages thereof, which are distinguished by an "a".

or about the 24th day of September, 1955, a certain 1947 Ford Automobile, with Cadillac Motor, and approximately 116 gallons of tax-paid liquor and wine was unlawfully seized and taken from him by Alcohol and Tobacco Tax Unit Agent Glenn Starrett and other agents of the Alcohol and Tobacco Tax Unit, whose names are to this defendant unknown. Defendant further represents and shows to the Court that said property was taken from him against his will and illegally and without any lawful authority, and accordingly said property was taken from him in violation of his rights under Amendments 4, 5, and 14 of the Constitution of the United States.

"Wherefore, defendant prays that said property be suppressed and not introduced in evidence against him and that any and all descriptions of said property be suppressed as evidence and not admitted in evidence against him.

"Russell G. Cofer, Defendant
By Jack L. Spivey,
His Attorney,
701 Fidelity Bank Building,
Oklahoma City, Oklahoma."

On November 11, 1957, the Motion to Suppress Evidence was withdrawn by petitioner with leave of Court (R. 25, 57).

The pertinent evidence is as follows: During the night and morning of September 23 and 24, 1955 (R. 4, 10, 11, 14), a 1947 Ford (R. 6) drove into the curtilage of the LaCuesta Liquor Store at Neosho, Missouri, possibly three-quarters of a mile or a mile south of Neosho on Highway 71 (R. 5). The driver was recognized by Government witness Layton (R. 6). When the automobile emerged from a garage near the liquor store about 2:00 o'clock in the morning the

back end of it "appeared to be loaded" (R. 7). After describing in detail the chase of the 1947 Ford by Government investigators, Government witness Starrett identified petitioner as the driver (R. 15). Government witness Gibson testified that when he arrived at the scene where the automobile involved in the chase had been stopped, agent Starrett and a man and woman (the Watsons) were there, and that numerous articles of clothing and a letter, which (if believed to belong to petitioner, as indicated) could connect petitioner to the automobile, were found in the car by the witness (R. 18).

Return on the warrant of arrest of Cofer shows petitioner was arrested *September 23, 1957*, about two years after the occurrences testified to at the trial (R. 56). The trial court directed the jury to "Take into consideration his [petitioner's] statement made in this Court by way of admitting that he was the owner of that Ford car, and also the contents thereof." (R. 31, 32). Petitioner did not testify at the trial, and therefore assumes that the trial court's reference to an admission by him refers to his Motion to Suppress Evidence.

After all other evidence was submitted the following transpired:

> Mr. Flynn: "I now read to the jury official document in the file of this case entitled 'In the District Court of the United States for the Western District of Missouri, Southwestern Division, United States of America vs. Russell G. Cofer, George Preston Sappington, defendants.'".
>
> Mr. Spivey: "Just a minute. May I make a record on that?"

The Court: "Yes."

Mr. Spivey: "Let the record show the Defendant Cofer objects to the reading of the motion from the file in this cause, which motion was filed November 7, 1957, styled 'Motion to Suppress Evidence', in that on the 9th day of—pardon me, on the 11th day of November, 1957, the court granted the defendant's oral motion to withdraw this motion to suppress evidence, and that the same therefore does not constitute a pleading of record."

The Court: "Overruled."

Mr. Flynn: "Case No. 2287, entitled 'Motion to Suppress Evidence'. Filed November 7, 1957, J. C. Truman, clerk, by E. R. Crocker." (Whereupon Mr. Flynn read verbatim the Motion to Suppress Evidence to which he had referred) "With a note on it, 'withdrawn by leave of court'." (R. 24, 25).

On November 11, 1957, petitioner Russell G. Cofer in the trial court filed his Motion to Dismiss in the following language:

"Comes now defendant Russell G. Cofer and moves the Court that the information herein filed against him be dismissed upon the following grounds:

"1. The information does not state facts sufficient to constitute an offense against the United States." (R. 4).

which was overruled by the trial court (R. 57).

On November 12, 1957, petitioner Cofer filed his Motion for Acquittal on Count I in the following language:

"Comes now the defendant, Russell G. Cofer, and at the close of the plaintiff's testimony moves the Court to enter judgment of acquittal in this case for the reason that the evidence fails to prove an offense against the United States." (R. 51).

also overruled by the trial court (R. 57).

Subsequent to instruction of the jury by the trial court, the jury returned a verdict finding petitioner Russell G. Cofer guilty as charged in Count I of the Information (R. 52).

By Judgment and Commitment, petitioner was sentenced to imprisonment for one year and assessed a fine of Five Hundred Dollars ($500.00) without costs (R. 52, 53).

Thereafter petitioner herein perfected his appeal to the United States Court of Appeals for the Eighth Circuit by filing his Notice of Appeal, Points on which Appellant Relies for Reversal and Designation of Parts of Record to be Printed, November 23, 1957 (R. 53, 54, 55, 56).

REASONS FOR GRANTING THE WRIT

I

A. The Fourth Amendment to the Constitution of the United States stands as the citizen's guarantee that he shall be secure in person and property against unreasonable search and seizure. In *Weeks* v. *United States* (1914) 232 U.S. 383, this Court held that evidence obtained through an illegal search and seizure was inadmissible in a federal prosecution. That protective doctrine, however, is not one which the trial court seeks to apply through its own initiative. It is

only when the accused comes forward to assert the illegality of a search and seizure and prays that the evidence so acquired be suppressed from criminal proceedings against him, that the trial court will invoke its principle of exclusion. *Segurola* v. *United States* (1927) 275 U.S. 106; *Gouled* v. *United States* (1921) 255 U.S. 298; Rule 41(e) F.R. Crim. P. Having brought in issue the circumstances surrounding the search and seizure, the accused takes upon himself the burden of establishing the unlawfulness of them. *Nardone* v. *United States* (1939) 308 U.S. 338. Furthermore, the right to challenge the legality of a search and seizure is conditioned upon the claim of the moving party of a proprietary or possessory interest in that which was seized and sought to be introduced in evidence. *Steeber* v. *United States* (CA 10, 1952) 198 F. 2d 615, 33 A.L.R. 2d 1425.

Closely allied with the right to protection from unlawful search and seizure, propounded by the Fourth Amendment, is the right to refuse to give incriminating evidence against one's self, guaranteed by the Fifth Amendment. While an accused is entitled to the protection of both these fundamental precepts of our law, it is petitioner's contention that the courts below have forced him to chose one to the exclusion of the other.

A short review of the proceedings in the trial court will enable petitioner to demonstrate this conclusion. Prior to the trial of the issues of the case, petitioner, attempting to avail himself of the exclusion privilege, filed a Motion to Suppress Evidence, alleging that the Ford automobile and its cargo of 116 gallons of tax-paid liquor were unlawfully seized and taken from

him by federal officers and prayed that these properties be suppressed and not introduced in evidence against him. Two days later the motion was withdrawn with leave of Court. At the trial petitioner chose to remain silent, leaving the prosecution to establish his guilt beyond a reasonable doubt from evidence other than he might give. Through the testimony of various Alcohol and Tobacco Tax Unit investigators (R. 4-19), the proprietor of an automobile repair shop (R. 19-20), and the office manager of a tire shop (R. 20), the prosecution attempted to link petitioner with the seized Ford automobile and liquor.[2] At the conclusion of the testimony of his last witness, Government counsel sought to apply the "clincher." Reading to the jury, over petitioner's objection, the Motion to Suppress Evidence, which had been filed and withdrawn, the prosecution placed in evidence petitioner's damaging admission of possessory or proprietary interest in the seized property.

Discounting for the present that the motion to suppress was later withdrawn,[3] it is clear that petitioner sought to invoke the guarantee of the Fourth Amendment and the protection of the Weeks doctrine. It is equally true that petitioner has paid a high price for envoking the privilege of assailing the methods by which the Government obtained vital evidence. The price? A forthright admission that "a certain 1947 Ford automobile, with Cadillac motor, and approximately 116 gallons of tax-paid liquor and wine was . . . TAKEN FROM HIM . . ." (Emphasis added).

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[2] Contrary to the view which the Court of Appeals apparently took of the record (3a), petitioner was not apprehended by federal officers at the time of the seizure of the automobile and its contents.

[3] The subsequent withdrawal emphasizes the quandary which the present state of the law induces.

B. The Court of Appeals attempts to downgrade the significance of that admission. Its observation that petitioner "does not state in his motion that the liquor seized was his, or that he was attempting to transport it into Oklahoma"(2a) does not face the issue. Furthermore, its assumption that the words "taken from him" are not indicative of a proprietary interest is far from convincing in the light of the trial court's instruction to the jury to "Take into consideration his [petitioner's] statement made in this Court by way of admitting that he was the *owner* of that Ford car, and also the contents thereof." (R. 31, 32). (Emphasis added.)[4] Assuming, however, that the Circuit Court is correct in its interpretation of those words and that the intent to enter Oklahoma can be established, can it be said that the admission is any less damaging if interpreted to admit only *possession* of the intoxicating liquor?

The Court of Appeals avoids the question presented in this phase of the petition, holding that the introduction of the Motion to Suppress Evidence was merely non-prejudicial surplusage. Petitioner cannot agree that the use of his admission that he was in possession of (or the owner of) the Ford automobile and its contents, seized by federal officers after an early morning chase, was non-prejudicial. Proof of that fact was an essential element of the case. (See note 2 *supra*). A more candid appraisal would seem to be that the introduction of petitioner's admission relegated the circumstantial evidence adduced from the Government's witnesses to the limbo of surplusage.

[4] Inasmuch as petitioner did not testify at the trial, the trial court's reference to an admission made by petitioner must have been that contained in his Motion to Suppress Evidence.

Regardless of the material effect of the admission upon the outcome of the trial, the question presented is one for which the decisions of this Court demand an answer: *Lyons* v. *Oklahoma* (1944) 322 U.S. 596; *Bram* v. *United States* (1897) 168 U.S. 532. It is well established the introduction of a coerced confession at a trial requires that the judgment of conviction "be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." *Malinski* v. *New York* (1945) 324 U.S. 401, 404. The introduction of petitioner's admission, voluntary only as a prerequisite required by law for standing to invoke the exclusion rule, should be treated no differently. "Constitutional rights may suffer as much from subtle intrusions as from direct disregard." *Malinski* v. *New York, supra,* at 410.

C. The rule is firmly established that where a motion to suppress has been sustained, supporting evidence offered to prove a possessory or proprietary interest in seized property is inadmissible in evidence on trial of the case. *Safarik* v. *United States* (CA 8, 1933) 62 F. 2d 892, citing *Silverthorne Lumber Co.* v. *United States* (1920) 251 U.S. 385. On the other hand, where the motion to suppress has been overruled the few courts which have met the question have held, with little elaboration by way of justification, the testimony in support of the motion admissible. *Fowler* v. *United States* (CA 10, 1956) 239 F. 2d 93; *Heller* v. *United States* (CA 7, 1932) 57 F. 2d 627, cert. den. 286 U.S. 567; *Kaiser* v. *United States* (CA 8, 1932) 60 F. 2d 419, cert. den. 287 U.S. 654; *Vaught* v. *United States* (CA 9, 1925) 7 F. 2d 370; *United States* v. *Lindsly* (E.D. La., 1925) 7 F.2d 247, rev'd on other grounds (CA 5, 1926) 12 F. 2d 771. This Court, so far as peti-

tioner can determine, has never passed upon the precise question here involved.

It is petitioner's contention that the holdings of the last-cited cases can be sustained *neither* in justice *nor* in logic, and that their roots are to be found in the yearning for symmetry in the law. In this view petitioner is not without eminent authority. The opinion of Circuit Judge Evans (dissenting in part) in the case of *Heller v. United States*, *supra*, contains the most extensive treatment of the question found in the reported cases. Judge Evans convincingly argued as follows:

> "It is . . . clear, however, that the accused's right to exclude such evidence [alleged to have been obtained by virtue of an unlawful search and seizure] is dependent upon his proceeding before trial to have such evidence suppressed and returned to him. Segurola v. U.S., 275 U.S. 106, 48 S. Ct. 77, 72 L. Ed. 186.
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> "It was, therefore, necessary for the appellant in this case, in order to protect himself against the use of evidence which he asserts was unlawfully obtained, to make application for a return of the property unlawfully seized. The necessity of applying for the return of the property carried with it the burden of supporting the allegations of his petition by testimony showing the search and the seizure were unlawful. The evidence thus given to support such petition is received for no other reason than to protect a constitutional right granted the accused by the Fourth Amendment. If such testimony can only come from the lips of the accused, then his testimony, *as well as his petition*, should not be used against him.
>
> "Protection of the citizen's right against invasion by unlawful seizure following unlawful search is only possible through rulings which prevent, both theoretically and practically, the vio-

lation of the Fourth Amendment." 57 F.2d at 630. (Emphasis added).

Referring to *Weeks* v. *United States, supra,* and *Gouled* v. *United States, supra,* Judge Evans continued:

> ". . . Under these decisions the impropriety of using evidence secured in violation of the Fourth Amendment is not debatable. Evidence unlawfully obtained by federal officials in violation of the accused's right under the Fourth Amendment *may not be used* to secure the accused's conviction against his objection, timely made. Accepting this proposition as our major premise, it necessarily follows as a corollary that evidence given by the accused to sustain his objection, there being no evidence but that of the accused to establish the unlawful search and seizure, must also be incompetent. In fact, its exclusion is but another application of the Weeks and Gouled decisions." 57 F. 2d at 630.

Blind adherence to the doctrine of the cases in the *Fowler* line, *supra*, short-circuits an accused's right to the full protection of both the Fourth and Fifth Amendments. Not knowing beforehand whether a motion to suppress evidence, allegedly obtained by virtue of an unlawful search and seizure, will be sustained, the accused finds himself in a perplexing situation. Should he move to suppress, he gambles his right to remain silent in the face of prosecution: Should he fear the consequences of a damaging admission, he forfeits his right to an examination of the methods by which evidence is brought against him.[5]

[5] It was a similar dilemma which a minority of the Court attacked in the case of *Rogers* v. *United States* (1951) 340 U.S. 367, 378, to wit: "Moreover, today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege [against self-incrimination] pre-

The desire for symmetry in the law should not be allowed to corrode our fundamental concepts of criminal justice. Speaking of the limitations upon the right of a witness to invoke the Fifth Amendment, this Court has said "if the witness upon interposing his claim, were required to prove the hazard [of incrimination] in the sense in which a claim is usually required to be established in court, *he would be compelled to surrender the very protection which the privilege is designed to guarantee.*" *Hoffman* v. *United States* (1951) 341 U.S. 479, 486 (emphasis added). Within the same principle, if the prosecution is permitted to read into evidence petitioner's Motion to Suppress Evidence, petitioner has been compelled to surrender the guarantee of the Fifth Amendment in order to assert his privilege under the Fourth.

The rule which petitioner recommends to this Court would in no way interfere with the orderly prosecution of criminal cases. At most its application would deprive the Government of "windfall" evidence in favor of securing for every accused the practical as well as the theoretical right to challenge questionable searches and seizures.

D. Even if this Court should adopt a view contrary to that advocated above, there is yet another aspect of the decision below which compels reversal. The ruling contravenes the general principles enunciated by this Court in that it refuses to give effect to the withdrawal of petitioner's Motion to Suppress Evidence. In *Kercheval* v. *United States* (1927) 274 U.S.

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maturely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

220, 224, it was held that the effect of a withdrawal of a plea of guilty is to "adjudge that the plea of guilty be held for naught."[6] Petitioner contends that this ruling is broad enough to cover the withdrawal of any other pleading.

The lower court tries to remove the sting of the use of the Motion to Suppress Evidence by stating "The motion was apparently not withdrawn in the sense that it was expunged or removed from the files of the District Court." (2a, 3a). Would this observation require petitioner to have taken physical possession of the paper upon which was written his Motion to Suppress Evidence before it would be considered withdrawn? "Withdrawn by leave of Court" was even noted on the motion (R. 25).

The language used by the Supreme Court of Georgia in *White* v. *State*, 51 Ga. 286, 289, as cited with approval by this Court in the *Kercheval* case, *supra*, seems

[6] The authorities, in addition to this Court, seem to treat the withdrawal of a plea of guilty with unanimity. *Jamail* v. *United States* (CA 5, 1930) 37 F. 2d 576; *Pharr* v. *United States* (CA 6, 1931) 48 F. 2d 767; *Wharton on Criminal Evidence*, 10th Edition, Section 638.

to petitioner as applicable to the withdrawal of a motion to suppress evidence, containing detrimental admissions, as it is to a plea of guilty. That language is "The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty."

II

The second proposition upon which petitioner relies is that unless the provisions of Section 1262, Title 18, U.S.C., bring the acts denounced by the Information filed against the petitioner herein within its scope, the trial court had no jurisdiction over such acts because they do not constitute an offense against the United States as required by Section 3231, Title 18, U.S.C.

It is petitioner's contention that Oklahoma is not a state into which Section 1262, Title 18, U.S.C., prohibits the importation, bringing or transportation of intoxicating liquor. The last referred to section describes a state into which the transportation, bringing or importation of intoxicating liquor is a violation, as a "* * * state * * * in which all sales, except for scientific, sacramental, medicinal or mechanical purposes, of intoxicating liquor * * * are prohibited, * * *".

Assuming that the decision below is based upon the premise that "* * * *all sales*, except for scientific, sacramental, medicinal or mechanical purposes, of intoxicating liquor * * * *" (Emphasis added) does not include sales of intoxicating liquor for revenue purposes by the sheriffs of Oklahoma counties which are authorized and required by Oklahoma Statutes (Sections 101-108, Title 37, Oklahoma Statutes of,

1951) (Appendix E *infra*), it appears to petitioner that the reasoning leading to such a conclusion must be faulty for several reasons.

"All" as an adjective is defined by Webster as "every one of, the whole number of, the whole quantity of—with reference to extent, duration, amount, quality or degree." As "all" is used in this connection, it is an adjective—modifying, describing and limiting "sales". In the whole English language there is probably not a more inclusive word.

The statute here involved is criminal in nature and must be strictly construed; and it should be assumed that Congress knew what exclusions it wanted to make in drafting the statute since it made four specific exclusions—"* * * scientific, sacramental, medicinal, or mechanical purposes, * * *".

To conclude that Congress did not intend to include "judicial sales", "sales of contraband", or "sales of forfeited liquor" within the meaning of "all sales" when such sales are for revenue raising purposes, is to conclude that Congress did not mean what it said or was incapable of expressing its will. Congress made four specific exceptions to its language "all sales". It could have added as many more as it wanted, but it made only four—"* * * scientific, sacramental, medicinal, or mechanical purposes, * * *".

Before an accused can be punished, his act must be plainly within the statute. *United States* v. *Resnick* (1936) 299 U.S. 207; *Donnelly* v. *United States* (1927) 276 U.S. 505; *Lanzetta* v. *New Jersey* (1939) 306 U.S. 451; *First National Bank of Anamoose* v. *United States* (CA 8, 1913) 206 F. 374. The Eighth Circuit Court of Appeals has heretofore held, *Arnold* v. *United States* (CA 8, 1940) 115 F. 2d 523, 527, that "A penal statute

which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder."

At best, Oklahoma is not clearly or plainly within the definition of states "* * * in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor * * * are prohibited * * *". If Oklahoma is not clearly or plainly within such definition, importation or attempted importation of intoxicating liquor into Oklahoma is not clearly or plainly "* * * within the class of acts * * *" denounced by Title 18, U.S.C. Section 1262.

III

Primarily as a preface to the conclusions set forth below, and with particular reference to the first question presented, petitioners would restate Judge Hutcheson's language in *Demetree* v. *United States* (CA 5, 1953) 207 F. 2d 892, 893. This is another of the growing list of criminal cases where the defendant chooses not to take the stand, in which the Government, having little or no direct evidence of defendant's guilt, attempts to use a legitimate and proper preliminary motion of defendant to shift the burden of proof, resulting in a conviction by reason of defendant's own statement in the preliminary motion. In this attempt, unless the greatest of care is taken, there is a danger of the cases being tried on the theory which, "keeping to the car, the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing" the admission and use of such a preliminary motion.

CONCLUSION

Petitioner herein raises three important questions which merit the exercise of jurisdiction by this Court. (1) The Government's use of the motion to suppress in evidence against the accused involves an application of the Fourth and Fifth Amendments to the Constitution of the United States which this Court has not passed upon. (2) The decision below, so far as it concerns the effect of the withdrawal of the motion to suppress, contravenes established principles of federal law. (3) The scope of federal jurisdiction under 18 U.S.C. 1262, which by its terms expressly applies only to states in which "all sales", with rigidly enumerated exceptions, of intoxicating liquor are forbidden, and which has been construed by the court below adversely to petitioner, has not been considered or passed upon by this Court.

For the foregoing reasons, petitioner respectfully requests that the petition for a writ of certiorari be granted and that his conviction be set aside or in the alternative that a new trial be ordered, excluding the use of the incriminating admissions found in the Motion to Suppress Evidence.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,913.

RUSSELL G. COFER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[June 18, 1958]

Sam W. Moore (Jack L. Spivey was with him on the brief) for Appellant.

Joseph L. Flynn, Assistant United States Attorney, (Edward L. Scheufler, United States Attorney, was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH and VAN OOSTERHOUT, Circuit Judges.

SANBORN, Circuit Judge.

Russell G. Cofer has appealed from a judgment and sentence based upon the verdict of a jury finding him guilty under the first count of an information which charged him with having, on September 24, 1955, in Newton County,

Missouri, attempted to transport intoxicating liquor into the State of Oklahoma, in violation of 18 U. S. C. § 1262.

The information was filed January 25, 1957. Cofer entered a plea of not guilty on November 5, 1957. The case was tried on November 12 and 13, 1957. The verdict of the jury was returned on November 13, and Cofer was sentenced to imprisonment for one year and to a fine of $500. Notice of appeal was filed on November 23, 1957, and the case was argued and submitted to this Court on May 7, 1958.

The question of the sufficiency of the evidence to support the jury's verdict is not properly before us for review, since no motion was made by Cofer for a directed verdict of acquittal at the close of the entire evidence. However, our examination of the record shows that there was ample evidence to justify the jury in believing and finding that, at the time and place named in the information, Cofer took on a load of intoxicating liquor in his Ford automobile, equipped with a Cadillac motor and that he intended, and was attempting, to transport the liquor into Oklahoma, and would have done so had he not been chased and intercepted, while still in Missouri, by investigators of the United States Alcohol and Tobacco Tax Unit. See and compare, *Gregg* v. *United States*, 8 Cir., 113 F. 2d 687, 690-691; *Daniel* v. *United States*, 8 Cir., 127 F. 2d 1, 2-3.

Cofer asserts that the District Court erred prejudicially when it permitted counsel for the Government to read to the jury a motion filed by Cofer on November 7, 1957, to suppress as evidence the intoxicating liquor he was transporting on September 24, 1955, when he was arrested. In his motion he refers to the liquor as "116 gallons of tax paid liquor and wine," and says "that said property was taken from him against his will and illegally." He does not state in his motion that the liquor seized was his, or that he was attempting to transport it into Oklahoma. The docket entries show: "11/11/57 Motion to suppress evidence is withdrawn, by leave of Court." The motion was

apparently not withdrawn in the sense that it was expunged or removed from the files of the District Court. Whether the admissions contained in the motion would have been inadmissible had they done anything more than corroborate the undisputed testimony of the officers who seized Cofer's car, the liquor, and Cofer himself, it is not necessary to decide. The introduction in evidence, by the Government, of the motion to suppress, as an admission against interest, was, in our opinion, nonprejudicial surplusage.

Cofer asserts that Oklahoma does not qualify for coverage under 18 U. S. C. § 1262 as a state "in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor * * * are prohibited"; and that therefore an attempt to transport liquor into Oklahoma is not a federal offense. This contention is based upon Sections 101 to 108 of Title 37 of the Statutes of Oklahoma of 1951, relating to the disposition of intoxicating liquor seized within the state which is capable of being sold in lawful commercial channels outside of the state. In effect, what Cofer contends is that, since the state permits sales within the state, by a sheriff, of forfeiting intoxicating liquor saleable in legitimate channels, to persons outside the state, Oklahoma cannot be said to be a state in which "all sales" are prohibited.

It is doubtful that the question is properly reviewable by this Court. The printed record on appeal does not show that the question was ever specifically presented to or ruled upon by the trial court. True, there was a motion to dismiss the information on the general ground that it did not state a federal offense, but no specific reason was stated in the motion. At the close of the Government's evidence, Cofer moved for a judgment of acquittal on the ground that no federal offense had been proved, but without stating why, so far as the record shows. The trial court instructed the jury, in effect, that Oklahoma was a state in which the sale of intoxicating liquor was prohibited, and that, if the jury found that Cofer intended to

transport the liquor he had in his car into that state, he was guilty of the charge contained in the first count of the information.

No objections were made and no exceptions taken to the charge of the court in this regard, and nowhere in the record have we been able to find that what we are now asked to decide was specifically called to the attention of, or ruled upon by, the trial court. The function of this Court is to review only rulings made by a trial court on questions brought to its attention and passed upon by it. *Ayers* v. *United States*, 8 Cir., 58 F. 2d 607, 608. The statement in Cofer's brief, under "Statement of Points * * *" that his conviction is not supported by the law or the evidence, brings up for review no ruling of the trial court and utterly fails to show that, at any stage of the proceedings, the trial court committed error. *Ayers* v. *United States*, supra, page 608 of 58 F. 2d. There is no basis in the record presented to us to justify a conclusion that the trial court made any erroneous ruling.

If if were obvious that, under the law, Cofer's attempt to transport intoxicating liquor into Oklahoma was not a federal offense because importation of liquor into that state had ceased to be a violation of Section 1262 of Title 18 U. S. C., this Court, regardless of all procedural deficiencies in the brief and record, could, and no doubt should, in the interests of justice, set aside his conviction. *Ayers* v. *United States*, supra, page 609 of 58 F. 2d. If Oklahoma has forfeited its right to the protection of Section 1262 of Title 18 U. S. C. by permitting sales by state officers of forfeited liquor in legitimate channels in other states, it is evident that the United States Court of Appeals for the Tenth Circuit has not yet discovered that fact. See *Ritter* v. *United States* (1956), 10 Cir., 230 F. 2d 324, and *Stevenson* v. *United States* (1952), 10 Cir., 200 F. 2d 109. We are advised that the United States District Court for the Northern District of Oklahoma has recently ruled (*United States* v. *Jay L. Jones, et al.*, Criminal No. 12,999, April 29, 1958) that "The sale of contraband liquors

by county officials as authorized by Oklahoma Statutes (Title 37, O. S. A., Sections 101-108) is not a sale within the contemplation of the Federal Statute (Title 18 U. S. C., Section 1262), which provides for federal aid in enforcement of liquor laws in the states which prohibit sale of intoxicating liquor." This, it seems to us, is a permissible and sensible construction of the applicable statute, and does no violence to any rule of statutory interpretation. "* * * even penal provisions must be given their fair meaning in accord with the evident intent of Congress." *Rainwater v. United States* . . . U. S. . . . opinion filed May 26, 1958.

The judgment appealed from is affirmed.

A true copy.

Attest:

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15913

SEPTEMBER TERM, 1957

Wednesday, June 18, 1958.

RUSSELL G. COFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Russell G. Cofer, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 18, 1958.

APPENDIX C

(Order Denying Petition of Appellant for Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15913

SEPTEMBER TERM, 1957

Thursday, July 17, 1958.

RUSSELL G. COFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appeal from the United States District Court for the Western District of Missouri.

Petition of the appellant for a rehearing having been considered by this Court. It is now here Ordered that the same be, and it is hereby, denied.

July 17th, 1958.

APPENDIX D

(Order Staying Issuance of Mandate)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15913

SEPTEMBER TERM, 1957

Friday, July 25, 1958.

RUSSELL G. COFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appeal from the United States District Court for the Western District of Missouri.

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 25, 1958.

APPENDIX E

OKLAHOMA STATUTES OF 1951, TITLE 37, SECTIONS 101-108.

"Section 101. Liquors sold outside state if capable of being sold.

"It is the intent of the Legislature that from and after the effective date of this Act, intoxicating liquors seized within the State of Oklahoma that are capable of being sold in lawful commercial channels outside of this State, be not destroyed, and to the contrary that same shall be sold in the aforesaid channels in the form and manner as in this Act provided.

"Section 102. Orders of Forfeiture—Contents

"To effect the intent of the Legislature and to carry out the purpose of this Act, all Courts making and entering orders forfeiting intoxicating liquors to the State of Oklahoma shall make the following enumerated findings in the order of forfeiture and shall include therein the following enumerated matters:

"(a) The name of the owner, if known, of the intoxicating liquors seized and ordered forfeited; the date and place of seizure and the identity of the officer or officers making the seizure.

"(b) The total quantity of liquor ordered forfeited specifying the measure of the containers in which the liquors ordered forfeited are contained.

"(c) The total amount of liquor ordered forfeited that is capable of being lawfully sold in the usual channels of commerce beyond the geographical limits of this State and the measure of the containers in which contained.

"(d) After having made the aforesaid findings, the court shall order all liquors capable of being sold as specified in the foregoing subsection (c), held by the officer then having custody thereof for sale in the form and manner as hereinafter specifically provided.

"(e) Order all liquor not capable of being sold destroyed in the manner provided by Section 90, Title 37, O. S. 1951, by the officer then having custody of same.

"Section 103. Inventory—Receipt

"In all of those instances where intoxicating liquors are ordered forfeited to this State, the officer then having custody of such liquor shall forthwith make an inventory in quadruplicate to the County Attorney covering same, and shall forthwith deliver the liquor to the Sheriff of the county in which seized. The Sheriff, upon receiving the intoxicating liquor, shall acknowledge receipt in writing on each copy of the inventory and shall retain a copy thereof. The officer making delivery shall then file the original inventory with the court ordering the liquor forfeited and retain a copy for his files and records.

"Section 104. Duties of Sheriff—Expenses

"Where the Sheriff of the county has or comes into possession of intoxicating liquors ordered forfeited, he shall forthwith destroy that portion of same that the court has adjudicated is not capable of sale; and shall within a reasonable length of time proceed to sell that portion found and ordered to be capable of sale by effecting a sale thereof at the best price obtainable in lawful commercial channels beyond the geographical limits of this State.

"The following things may be done in order to effect a sale:

"(a) The Sheriff may expend a reasonable amount in order to find a purchaser beyond the State.

"(b) In order to deliver the liquors sold to the purchaser, the Sheriff may transport same over the highways of this State.

"(c) He may ship the liquor by a common carrier of property to the purchaser, but if so shipped, a certified copy of the order of forfeiture must be delivered to the carrier.

"(d) The order of forfeiture shall be and constitute sufficient authority to do those things enumerated in the foregoing subsections of this Section.

"(e) The cost and expense of effecting a sale and a delivery of liquor sold shall become a part of the costs in the case in which the order of forfeiture was made.

"Section 105. Carriers To Accept Shipments

"When a shipment of intoxicating liquor is tendered by the Sheriff to a common carrier within the borders of this State for delivery beyond the borders of the State, and the tender is accompanied by a certified copy of the order of forfeiture, the carrier shall accept said shipment and transport same. In so doing the carrier shall not be amenable to criminal prosecution for accepting and transporting the liquor so received and transported.

"Section 106. Remittance and Return

"Upon the Sheriff effecting the sale of intoxicating liquors in the form and manner as by this Act provided, he shall forthwith deliver the proceeds of the sale to the clerk of the court ordering the forfeiture. The remittance shall be accompanied by a return of the sale showing: (1) The person to whom the liquor was sold and the purchaser's address; (2) an itemized statement showing the quantity of liquor sold and the price received therefor; and (3) an itemized statement covering the cost of the sale.

"(a) In those instances where intoxicating liquors are ordered destroyed, the Sheriff must make a return to the court showing a compliance with such order.

"Section 107. Confirmation of Sale—Disposition of Proceeds

"After the Sheriff has made a return of sale in form and manner as herein provided, the court ordering the forfeiture shall within a reasonable time conduct a hearing for the purpose of determining whether or not the sale should be confirmed. In the event the sale is confirmed, the court shall order the proceeds of the sale paid out as follows:

"(1) The payment of the cost of the case in which the order of forfeiture was made.

"(2) In the event the liquor was seized by officers of the county in which forfeited or by officers of this State, all monies remaining after the costs have been paid shall by the Court Clerk be paid over to the County Treasurer of the county and by said Treasurer credited to the Common School Fund.

"(3) In the event the liquor was seized by officers other than those above designated, twenty-five per

cent (25%) of the monies remaining after the court costs have been paid to the Treasurer of the political subdivision that paid the salary of the officers making the seizure and credited to the General Fund of such municipality; and the remainder shall be paid over to the County Treasurer and by him credited to the Common School Fund of such county.

"Section 108. Disposition of Forfeited Property Otherwise Than Provided—Punishment

"Any officer or employee whose duty it is to dispose of forfeited liquors, property and things, by sale or destruction as herein provided, who shall dispose of said forfeited liquors, property and things in any other manner than as herein provided, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), and be imprisoned in the county jail for not less than six (6) months nor more than twelve (12) months.

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Office Supreme Court, U.S.
FILED
SEP 22 1958
JAMES R. BROWNING, Clerk

No. 303

In the Supreme Court of the United States

OCTOBER TERM, 1958

RUSSELL G. COFER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 256 F. 2d 221.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958 (R. 70), and a petition for rehearing was denied on July 17, 1958 (R. 78). On August 15, 1958, by order of Mr. Justice Black, the time for filing the petition for a writ of certiorari was extended to and including August 26, 1958. The petition for a writ of certiorari was filed on August

23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Oklahoma is a state which prohibits all sales of liquor within the meaning of 18 U.S.C. 1262.

2. Whether the Court of Appeals erred in finding non-prejudicial the introduction, as cumulative proof of ownership of an automobile, of an admission of ownership in a motion to suppress which was later withdrawn.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 10-14.

STATEMENT

An information filed by the United States Attorney in the United States District Court for the Western District of Missouri, Southwestern Division, charged petitioner with attempting to transport intoxicating liquor into Oklahoma, a state which prohibits such importation, in violation of 18 U.S.C. 1262 (R. 1-2).[1] Petitioner was found guilty as charged by a jury on November 13, 1957 (R. 4, 47, 50, 52). He was sentenced to imprisonment for one year and a fine of $500 (R. 52-53). On appeal, the conviction was affirmed.

The evidence elicited at the trial may be summarized as follows:

---

[1] Count 2 of the information charged one George Sappington with aiding and abetting petitioner (R. 2).

During the night of September 23-24, 1955 (R. 4, 10, 11, 13), James V. Layton, an Alcohol Tax Unit investigator attempting to ascertain whether or not liquor was being transported into Oklahoma, conducted a surveillance at the La Cuesta Liquor Store near Neosho, Missouri (R. 4-5). Sometime after 12:30 a.m., a 1947 Ford coupe was driven from the highway into a garage attached at the rear of the liquor store, and the garage door was closed. The automobile appeared to be "rather high in the back" and bore Oklahoma license plates (R. 6-7). At about 2:00 a.m., George Sappington, the owner of the liquor store, came out of the garage, looked up and down the highway, and gave an arm signal (R. 5, 7). The Ford automobile, now bearing a Missouri license plate, with its lights turned off, and appearing to be loaded, was driven out of the garage. The coupe's lights were turned on as it drove away toward the Oklahoma border (R. 7, 60-61).

Meanwhile, investigator Layton had been broadcasting an account of these activities to other agents waiting in automobiles near the highway (R. 7). After a spirited and rather lengthy chase by federal agents (R. 10-11, 12-13), investigator Starrett rammed the Ford coupe and forced it to stop (R. 14). Considerable gunfire was exchanged, during the course of which Starrett was wounded. Petitioner, who was identified by Starrett as the driver of the Ford, was not apprehended at the time (R. 14-15, 31; Pet. 6).

Inspection of the Ford coupe revealed that it was equipped with a V-8 Cadillac engine; that there were three sets of license plates in the car; and that it contained clothing bearing petitioner's name and a

letter addressed to him (R. 18-19). It was also shown that petitioner had been known around Oklahoma City, Oklahoma, for many years, and was known to own a 1947 Ford coupe equipped with a Cadillac engine. He had not obtained an Oklahoma permit to import alcohol (R. 19-21).

At the end of the government's case, the prosecutor introduced, over objection, a Motion to Suppress Evidence which had been filed on November 7, 1957, five days before trial, in which petitioner asserted ownership of the Ford automobile and the liquor (R. 3, 24). The motion had been withdrawn by petitioner on November 11, 1957 (R. 24-25). In affirming the conviction, the Court of Appeals held that, since this evidence was merely cumulative, the introduction of the evidence was "nonprejudicial surplusage" (Pet. App. 3a).

ARGUMENT

1. 18 U.S.C. 1262, App. *infra*, p. 10, provides, *inter alia*, that anyone who attempts to import intoxicating liquor into a state which forbids all liquor sales except for scientific, sacramental, medicinal or mechanical purposes violates the federal statute. Petitioner argues that Oklahoma is not within this description (and hence that petitioner did not commit a federal offense) because Oklahoma law, set out *infra*, pp. 10-14, permits liquor seized within Oklahoma to be sold in lawful commercial channels outside the state. As we read the Oklahoma statutes, however, they merely provide that when intoxicating liquors are seized within the state, which are capable of being sold in lawful commercial channels *outside the*

state, they shall be so sold. These sections are essentially provisions for the administrative disposition of forfeited liquor.

The statute as a whole and in detail makes it clear that it is not authorizing the sale of liquor in Oklahoma. Even the title of these disposition sections states in pertinent part that it is an Act "* * * providing for the sale of intoxicating liquors beyond the State of Oklahoma in certain instances". Indeed, in order to make possible the administrative disposition of the liquor beyond the state it was necessary to authorize the sheriff to transport the liquor over the highways of the state and to authorize common carriers to take the shipment under specified conditions.

Section 102 of the Oklahoma statute provides for a judicial order based on a judicial finding that the liquor is capable of being sold as provided in Section 101, *i.e.* in "lawful commercial channels outside of this States". Section 107 further provides that, after the sheriff has made a sale and a return, the court ordering the forfeiture shall conduct a hearing for the purpose of determining whether or not the sale should be confirmed, and provides for distribution of the proceeds if the sale is confirmed. This does not authorize a sale in Oklahoma. It is merely a provision for the disposition of the proceeds from sale outside the state.

It is evident that by the statute of 1951 Oklahoma has not departed from its policy that liquor shall not be sold in Oklahoma to persons in Oklahoma. The purpose of 18 U.S.C. 1262 is to aid states which have a prohibition policy. Since Oklahoma has been and

remains such a state, 18 U.S.C. 1262 applies to persons using the channels of interstate commerce to bring liquor into Oklahoma.

In *Jones* v. *United States*, No. 5889, decided August 4, 1958, the Court of Appeals for the Tenth Circuit held, in accord with the decision below, that sales by Oklahoma sheriffs of seized liquors were sales which took place outside of the state and that Oklahoma was one of the states protected by 18 U.S.C. 1262.

2. In this case, the prosecution, after proving that petitioner had been identified as the driver of the automobile, that the automobile contained his clothing, and that he owned an automobile like that searched, also showed that petitioner had asserted ownership of the automobile and liquor in a motion to suppress filed prior to trial.[2] The Court of Appeals did not reach the general question of the admissibility of such an admission, finding that the evidence was "nonprejudicial surplusage" Pet. App. 3a). On the evidence in this case, summarized in the Statement, this conclusion was fully justified. See *Segurola* v. *United States*, 275 U.S. 106, 111; *Kaiser* v. *United States*, 60 F. 2d 410, 413 (C.A. 8), certiorari denied, 287 U.S. 654; *MacDaniel* v. *United States*, 294 Fed.

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[2] To have standing to move to suppress, petitioner had to show ownership either of the place searched or the property taken. *Baskerville* v. *United States*, 227 F. 2d 454 (C.A. 10); *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5); *Scoggins* v. *United States*, 202 F. 2d 211 (C.A. D.C.); *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858; see *United States* v. *Jeffers*, 342 U.S. 48; *Goldstein* v. *United States*, 316 U.S. 144, 121.

769, 770-771 (C.A. '6), certiorari denied, 264 U.S. 593. The ruling of the Court of Appeals on the particular factual situation before it presents no issue of importance warranting review by this Court.

In any event, the cases hold that where the motion to suppress is heard and overruled, it may be used as an admission at the trial. *Fowler* v. *United States*, 239 F. 2d 93, 95 (C.A. 10); *Kaiser* v. *United States*, *supra*, at 413; *Heller* v. *United States*, 57 F. 2d 627, 629 (C.A. 7); *Vaught* v. *United States*, 7 F. 2d 370, 371 (C.A. 9); *United States* v. *Lindsly*, 7 F. 2d 247, 255 (E.D. La.), reversed on other grounds, *Lindsly* v. *United States*, 12 F. 2d 771 (C.A. 5). The same rule would appear to be applicable when the motion is voluntarily withdrawn before a decision on its merits.[3]

The issue has been summed up by Professor Wigmore as follows (Wigmore, *Evidence*, § 1067).

> When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission limiting the issues and putting certain facts beyond dispute. Never-

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[3] We do not believe that the fact that the motion to suppress was signed by petitioner's counsel presents any difficulty. Defense counsel signed the motion "Russell G. Cofer, Defendant, by Jack L. Spivey, His Attorney" (R. 3). Petitioner has never disputed counsel's authority to so sign. Compare *Fowler* v. *United States*, 239 F. 2d 93 (C.A. 10). Even if defense counsel had merely signed his own name, he was petitioner's agent to manage the cause in all its parts. IV Wigmore, *Evidence*, § 1066(1); see *American Fur Company* v. *United States*, 2 Pet. 358, 361; *Jones et al.* v. *United States*, 72 F. 2d 873, 874 (C.A. 7); compare *Miller* v. *United States*, 133 Fed. 337, 349-351 (C.A. 8).

> theless, it exists as an utterance once deliberately made by the party. While thus denied all further effect as a pleading, may it not still be used as a quasi-admission, like any other utterance of the party?

For reasons of policy, some pleadings, even though admissions against interest, are not received. Where an accused person is permitted to withdraw a plea of guilty, for example, the plea is not later usable as an admission because such later use would nullify the permission given to withdraw and virtually guarantee a verdict of guilty, *Kercheval* v. *United States*, 274 U.S. 220. And where a motion to suppress is granted, any later use—by the prosecution at trial as part of its case-in-chief[1]—of the pleadings or testimony on the motion is not permitted since that would tend to nullify the effect of the order to suppress. *Safarik* v. *United States*, 62 F. 2d 892 (C.A. 8); see *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385.

But where the motion to suppress is voluntarily made and then withdrawn, and no violation of a constitutional right is shown, there would appear to be no reason of policy to forbid the use of the admission of ownership. A confession does not become inadmissible because a defendant later regrets that he has made it. So here, petitioner's withdrawal of the motion to suppress does not alter the fact that, prior to trial, he claimed ownership of the automobile.

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[1] Compare the situation in *Walder* v. *United States*, 347 U.S. 62, where suppressed evidence was used to contradict petitioner's affirmative perjurious testimony.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

SEPTEMBER, 1958.

APPENDIX

18 U.S.C. 1262 provides in pertinent part:

> Whoever imports, brings, or transports any intoxicating liquor into any State, Territory, District, or Possession in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor containing more than 4 per centum of alcohol by volume or 3.2 per centum of alcohol by weight are prohibited, otherwise than in the course of continuous interstate transportation through such State, Territory, District, or Possession or attempts so to do, or assists in so doing,
>
> Shall (1) If such liquor is not accompanied by such permits, or licenses therefor as may be required by the laws of such State, Territory, District, or Possession or (2) if all importation, bringing, or transportation of intoxicating liquor into such State, Territory, District, or Possession is prohibited by the laws thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

Oklahoma Statutes 1951, Title 37, provides in pertinent part:

> § 50.1 * * *
>
> It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State, containing more than four per cent (4%) of alcohol by volume, without a permit first secured therefor as hereinafter provided.

§ 101. * * *

It is the intent of the Legislature that from and after the effective date of this Act, intoxicating liquors seized within the State of Oklahoma that are capable of being sold in lawful commercial channels outside of this State, be not destroyed, and to the contrary that same shall be sold in the aforesaid channels in the form and manner as in this Act provided.

§ 102. * * *

To effect the intent of the Legislature and to carry out the purpose of this Act, all courts making and entering orders forfeiting intoxicating liquors to the State of Oklahoma shall make the following enumerated findings in the order of forfeiture and shall include therein the following enumerated matters:

(a) The name of the owner, if known, of the intoxicating liquors seized and ordered forfeited; the date and place of seizure and the identity of the officer or officers making the seizure.

(b) The total quantity of liquor ordered forfeited specifying the measure of the containers in which the liquors ordered forfeited are contained.

(c) The total amount of liquor ordered forfeited that is capable of being lawfully sold in the usual channels of commerce beyond the geographical limits of this State and the measure of the containers in which contained.

(d) After having made the aforesaid findings, the court shall order all liquors capable of being sold as specified in the foregoing subsection (c), held by the officer then having custody thereof for sale in the form and manner as hereinafter specifically provided.

(e) Order all liquor not capable of being sold destroyed in the manner provided by Section 90, Title 37, O.S. 1951, by the officer then having custody of same.

* * * * *

§ 104. * * *

Where the Sheriff of the county has or comes into possession of intoxicating liquors ordered forfeited, he shall forthwith destroy that portion of same that the court has adjudicated is not capable of sale; and shall within a reasonable length of time proceed to sell that portion found and ordered to be capable of sale by effecting a sale thereof at the best price obtainable in lawful commercial channels beyond the geographical limits of this State. The following things may be done in order to effect a sale:

(a) The Sheriff may expend a reasonable amount in order to find a purchaser beyond the State.

(b) In order to deliver the liquors sold to the purchaser, the Sheriff may transport same over the highways of this State.

(c) He may ship the liquor by a common carrier of property to the purchaser, but if so shipped, a certified copy of the order of forfeiture must be delivered to the carrier.

(d) The order of forfeiture shall be and constitute sufficient authority to do those things enumerated in the foregoing subsections of this Section.

(e) The cost and expense of effecting a sale and a delivery of liquor sold shall become a part of the costs in the case in which the order of forfeiture was made.

§ 105. * * *

When a shipment of intoxicating liquor is tendered by the Sheriff to a common carrier within the borders of this State for delivery beyond the borders of the State, and the tender is accompanied by a certified copy of the order of forfeiture, the carrier shall accept said shipment and transport same. In so doing the carrier shall not be amenable to criminal prosecution for accepting and transporting the liquor so received and transported.

§ 106. * * *

Upon the Sheriff effecting the sale of intoxicating liquors in the form and manner as by this Act provided, he shall forthwith deliver the proceeds of the sale to the clerk of the court ordering the forfeiture. The remittance shall be accompanied by a return of sale showing: (1) The person to whom the liquor was sold and the purchaser's address; (2) an itemized statement showing the quantity of liquor sold and the price received therefor; and (3) an itemized statement covering the cost of the sale.

(a) In those instances where intoxicating liquors are ordered destroyed, the Sheriff must make a return to the court showing a compliance with such order.

§ 107. * * *

After the Sheriff has made a return of sale in form and manner as herein provided, the court ordering the forfeiture shall within a reasonable time conduct a hearing for the purpose of determining whether or not the sale should be confirmed. In the event the sale is confirmed, the

court shall order the proceeds of the sale paid out as follows:

(1) The payment of the cost of the case in which the order of forfeiture was made.

(2) In the event the liquor was seized by officers of the county in which forfeited or by officers of this State, all monies remaining after the costs have been paid shall by the Court Clerk be paid over to the County Treasurer of the county and by said Treasurer credited to the Common School Fund.

(3) In the event the liquor was seized by officers other than those above designated, twenty-five per cent (25%) of the monies remaining after the court costs have been paid shall be paid to the Treasurer of the political subdivision that paid the salary of the officers making the seizure and credited to the General Fund of such municipality; and the remainder shall be paid over to the County Treasurer and by him credited to the Common School Fund of such county.

§ 108. * * *

Any officer or employee whose duty it is to dispose of forfeited liquors, property and things, by sale or destruction as herein provided, who shall dispose of said forfeited liquors, property and things in any other manner than as herein provided, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), and be imprisoned in the county jail for not less than six (6) months nor more than twelve (12) months.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 383

RUSSELL G. COFER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OCTOBER TERM, 1958

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v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent (the United States) in its Brief in Opposition has chosen to realign and restate petitioner's Questions Presented in such a way as to obscure its failure to fairly meet, contest or refute the

principle argument advanced by petitioner[1] that a denial of the fundamental guarantees of the Fourth and Fifth Amendments to the Constitution of the United States results from the admission in evidence of an incriminating statement (tantamount to an admission of guilt) made by the accused solely as a prerequisite for standing to invoke the rule of exclusion of the *Weeks* case to suppress evidence allegedly obtained through an unlawful search and seizure.

1. Petitioner in its argument placed the holding of the case of *Fowler* v. *United States* (CA 10, 1956) 239 F. 2d 93 (and the authorities relied upon therein),[2] that a motion to suppress if overruled may be used as an admission at the trial, squarely in issue. Respondent answers petitioner's objections to the principle enunciated by the cases of the *Fowler* line by the simple expedient of reciting the rule and citing the cases under attack. That very technique of blind adherence and refusal to explain, analyze or justify is in character with the growth of the principle in these cases.

Respondent justifies this treatment on the grounds that use of the admission, in view of other evidence

[1] The Brief in Opposition does respond to the second question which petitioner raises, i.e., the applicability of Section 1262 of Title 18 U.S.C. to the State of Oklahoma, and therefore petitioner does not elaborate on that question in this Reply. Petitioner's contentions with respect to that question are set forth at pages 17-19 of the Petition.

[2] See page 12 of the Petition citing Heller v. United States (CA 7, 1932) 57 F. 2d 627, cert. den. 286 U.S. 567; Kaiser v. United States (CA 8, 1932) 60 F. 2d 410, cert. den. 287 U.S. 654; Vaught v. United States (CA 9, 1925) 7 F. 2d 370; United States v. Lindsly (E.D. La., 1925) 7 F. 2d 247, rev'd on other grounds (CA 5, 1926) 12 F. 2d 771.

allegedly linking the petitioner with the automobile and contraband liquor, was "nonprejudicial surplusage". Even if such a characterization has merit, although petitioner earnestly asserts that it does not, this Court, in cases involving fundamental constitutional rights, has swept aside the judicial cure-all of "harmless error" and given full effect to constitutional guarantees. *Bram* v. *United States* (1897) 168 U.S. 532; *Lyons* v. *Oklahoma* (1944) 322 U.S. 596; *Malinski* v. *New York* (1945) 324 U.S. 401; *Grunewald* v. *United States* (1957) 353 U.S. 391 reversing 233 F. 2d 556. Cf. *Stein* v. *New York* (1953) 346 U.S. 156. Judge Frank (dissenting in part) in the Court of Appeals decision in the *Grunewald* case, *supra*, admonished that "Such an error [the invasion of a constitutional right] cannot be deemed harmless." 233 F. 2d at page 578.

2. While it is petitioner's contention that in order to secure the practical as well as theoretical guarantees of the Fourth and Fifth Amendments admissions of proprietary or possessory interest requisite for standing to attack search and seizure methods should be excluded from evidence regardless of the ruling on the motion to suppress, petitioner does not thereby express approval of the standing rule itself.[3] To the contrary, petitioner, recognizing that fairly comprised within the first question presented is the ques-

[3] The so-called standing rule, requiring one who challenges the legality of a search and seizure assert either a proprietary or possessory interest in that which was seized and sought to be introduced in evidence, has become the general rule in the federal courts (Pet. p. 9 and Br. in Opp., note 2). This Court has not explicitly passed on the requirement. *Goldstein* v. *United States* (1942) 316 U.S. 114, 121; and see *McDonald* v. *United States* (1948) 335 U.S. 451, 456; *United States* v. *Jeffers* (1951) 342 U.S. 48.

tion of the validity of the standing rule, joins with those who condemn that rule.

Attacks upon the standing rule have been frequent and vehement. One writer has declared it to be "the most devitalizing force" in limiting the doctrine of the *Weeks* case.[4] The most recent protest against this devitalization is found in the Court of Appeals for the District of Columbia Circuit in the opinion of Judge Bazelon (dissenting) in *Christensen* v. *United States* No. 14377 decided August 28, 1958 where it is said:

> ". . . Where it is clear from the circumstances that the defendant's constitutional right to be free from unreasonable search and seizure has in fact been violated, a requirement that, as a condition to excluding the product of the search, the victim must affirmatively admit possession of the article, which in the case of contraband amounts to confessing guilt, is an obvious, even if not avowed, abandonment of *Weeks*. We place the victim of the search upon the horns of a dilemma. If he does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him."[5]

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[4] Grant, *Circumventing The Fourth Amendment* (1941) 14 S. Cal. L. Rev. 359, 368.

[5] Petitioner submits that an accused victimized by a *clearly unreasonable* search and seizure has little objection to the standing rule if the case of *Safarik* v. *United States* (CA 8, 1933) 62 F. 2d 892 (citing *Silverthorne Lumber Co.* v. *United States* (1920) 251 U.S. 385) is followed. However, the language quoted is as apropos to the more subtle problem posed when the ruling on a motion to suppress cannot be predicted with certainty. See *Christensen* v. *United States, supra* note 9.

Judge Bazelon argues that inquiry into the proprietary interest is logical only in cases involving third party interest in the property seized and would limit the scope of the standing rule accordingly. Petitioner offers the alternative approach, exclusion from evidence of motions to suppress regardless of the ruling thereon. Either approach would effectively remedy the situation in which an accused is forced to gamble with his right against self-incrimination or forsake the protection of the *Weeks* doctrine.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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